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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 800

UNITED STATES OF AMERICA, APPELLANT

v.

LUDENIA HOWARD, TRADING AS STOKES FISH COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

APPELLEE'S BRIEF, INCORPORATING MOTION TO AFFIRM OR DISMISS

STATEMENT OF FACTS

Copy of the District Court's opinion in this case is correctly incorporated in Appendix A of Appellant's Statement as to Jurisdiction. However, the full scope of the questions involved are not disclosed there, due to the incomplete statement as to the Information, and by failure to set out the Motion to Quash the Information. Therefore, we set out in the Appendix to this brief, copy of "Information", and "Motion to Quash Information."

The Information in this case (App. p. 18) does

not allege that Ludenia Howard personally delivered the said shipment, or had any knowledge of the delivery thereof, or had any knowledge that any black bass or other forbidden fish were contained therein. Furthermore, said Information fails to allege that the said fish were not within the bag limit permitted to persons holding a valid fishing license.

The adequacy of the "Information" to charge an offense because of the lack of averments contained therein, was duly challenged by the Motion to Quash, which is also set out in the Appendix to this brief, p. 19. The Court, finding that the Federal Statute does not apply in this case, because there was no "law" in Florida which made the Act illegal, did not proceed to examine, or at least did not incorporate in his order a finding upon, the other grounds raised in the said motion. However, the Motion to Quash would be good if **any** ground contained therein was valid, and if the Information was defective for **any** reason. Reasons **other** than the construction of the Federal Statute, were certainly raised, and were certainly involved in the case. Had the learned judge not found that the Federal Statute was not applicable, there is no reason to believe that he might not well have given consideration to, and have quashed, the Information for lack of sufficient averments.

In the State of Florida, there is no statute or "law" that would make the act charged an offense. The most that can possibly be claimed by the Appellant is that the Federal statute applies if fish have been transported in violation of a transitory **rule or regulation** of the Game and Fresh Water Fish Com-

mission. (Such alleged violation we do not concede.)

DISCUSSION OF APPELLANT'S QUESTION

Appellant's single question, as stated in its brief, we believe to be fundamentally correct, although immaterial matters are incorporated therein. However, we think this is not the **sole question** involved, and we add the following:

APPELLEE'S QUESTION

Where the Motion to Quash filed against an Information is based, among other things, upon independent grounds that the Information is defective for failure to contain sufficient averments, as well as on the ground involving the construction of a Federal statute; and where there is grave question as to the sufficiency of the Information to state a cause of action for lack of necessary averments; and where the court might well have quashed the Information upon the ground of insufficient averments; and the court, being of the opinion that the Federal statute did not apply, based its order thereon, and thus refrained, as unnecessary, from discussing or considering the other defects in the Information; —does an appeal from such an order lie direct to the Supreme Court of the United States, or should it have been taken to the Circuit Court of Appeals?

ARGUMENT

as to Appellant's question, which is as follows:

"Whether the district court erred in construing the term 'law of the State', as used in the Federal Black Bass Act (which prohibits interstate transportation of black bass and oth-

> er fish if such transportation is contrary to the law of the state from which the fish is transported), as not including regulations issued by the Florida Game and Fresh Water Fish Commission, where (1) the Commission was created by a Florida constitutional amendment which vested it with sole authority to regulate transportation of fresh water fish in Florida and (2) the constitutional amendment provided that the legislature could pass laws in aid of the provisions of the amendment but not inconsistent therewith."
>
> (Statement as to Jurisdiction, p. 2)

The Appellant contends that this question is a very substantial question. This may or may not be correct. It certainly is very substantial from the standpoint of the Defendant—a very respectable and respected woman who is accused of a crime. We are without knowledge as to what the "Sport Fishing Institute Bulletin" may say, or the accuracy thereof. We certainly do not concede its authenticity, and we think it unimportant as compared with the liberty of this citizen. Clearly the one Federal statute relied upon by Appellant does not attempt to define the crime of transporting black bass and other fish, except by reference to the "law of the State" in question. It is not an offense in this case unless such transportation is contrary to the "law of the State" of Florida. There is no statute in Florida making the Act complained of illegal. If anything, there is only the "rule" of the Game and Fresh Water Fish Commission that has been violated (which violation we do not concede).

The Federal statute under which this Informa-

tion was brought makes it an offense against the Federal law to transport certain fish by any means from any state or territory, if such transportation is contrary to the "law of the state . . .". (See Federal Black Bass Act, Appendix B, p. 20 of Appellant's brief). This is a **penal** statute and, being such, it must be **strictly construed.** In this country, the liberty of its citizens is considered so important that an offense charged must be plainly within the statute. There are no **constructive offenses.**

United States v. Resnick et al
Same v. Acme Can Co.
299 U.S. 207; 57 S. Ct. 126

* * * *

"Charles Resnick and Joseph Resnick, partners trading as L. Resnick and Sons, were indicted on charges of selling for fruits and vegetables two-quart metal hampers which were not of any standard size authorized by statute and did not come within any tolerance established by the Secretary of Agriculture, and the Acme Can Company was indicted on charges of manfacturing two-quart metal hampers that were not of any authorized size or within prescribed tolerances without having submitted dimension specifications to the Secretary of Agriculture, and of sale thereof. From judgments sustaining demurrers in each case and discharging the defendants, the United States appeals"

* * * *

"(2-6) Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the **words used.** United States v. Wiltberger, 5 Weat. 76, 95, 5 L. Ed. 37; Fasulo

v. United States, 272 U.S. 620, 628, 47 S. Ct. 200, 201, 71 L. Ed. 443. . . . . ."

* * * *

"Before one may be punished, it must appear that his case is plainly within the statute; there are not constructive offenses. United States v. Lacher, 134 U.S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080; United States v. Chase, 135 U. S. 255, 261, 10 S. Ct. 756, 34 L. Ed. 117; Fasulo v. United States, supra, 272 U. S. 620, at page 629, 47 S. Ct. 200, 202, 71 L. Ed 443 . . . . . ." (emphasis supplied)

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50 Am. Jur., p. 430

"S407 Penal Statutes. — It has long been a well settled general rule that penal statutes are subject to strict construction. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. The rule is founded on the tenderness of the law for the rights of individuals; its object is to establish a certain rule, by conformity to which mankind would be safe, and the discretion of the court limited. . . . . ."

* * * *

(p. 433)

"S409. Application of Strict Construction.—In the interpretation of a penal statute, the tendency is to give it careful scrutiny, and to construe it with such strictness as to safeguard the rights of the defendant. If the statute contains a patent ambiguity, and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be pre-

ferred, and where there is any well-founded doubt as to any act being a public offense, it should not be declared such, but should rather be construed in favor of the liberty of the citizen. Hence, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. Acts in and of themselves innocent and lawful cannot be held to be criminal unless there is a clear and unequivocal expression of the legislative intent to make them such. Whatever is not plainly within the provisions of a penal statute should be regarded as without its intendment. Such a statute should not be interpreted to impose restrictions on conduct not specifically enumerated in the legislative act, or to include cases omitted by the legislature, and which do not fall within the scope of the law. The fact that the statute may be easily evaded furnishes no excuse for supplying by judicial construction that which is palpably omitted therefrom. These rules prevail even though the court thinks that the legislature ought to have made the statute more comprehensive."

The foregoing principle is certainly not contradicted by the case, cited by the Appellant, of **Lilly v. Grand Trunk R. Co.**, 317 U. S. 481. This was **not** a criminal case, but, on the contrary, the court adopted the principle of liberal construction because the statute was for the **protection of employees.** The Court said:

"The Act, like the Safety Appliance Act, 45 U.S.C.A. No. 1 et seq., is to be liberally construed in the light of its prime purpose, the

protection of employees and others by requirnig the use of safe equipment....."

Lilly v. Grand Trunk R. Co.
317 U.S. 481; 63 S. Ct. 347, 351

Likewise, the case of **Atchison, T. & S. F. Ry Co. v. Scarlett,** 300 U. S. 471, does not support the contention of the Appellant and does not conflict with the foregoing principle. This again was **not a criminal** prosecution, but applied to regulations for the safety of railroad employees and, therefore, was entitled to liberal construction. Likewise, the case of **Roumanian American Winery, Inc. v. Morgenthau,** 152, F. 2d 452, cited by Appellant, does not sustain Appellant's contention. This again was **not a criminal prosecution,** but was an attempt to secure a wine producer's and wholesaler's permit, and the question was whether or not the petitioner was a fit person to have such a permit, and had therefore been complying with the Federal law and rules and regulations regulating such business. The case is wholly without application to the case at Bar. Likewise, the case of **Phillips v. United States,** 312 U.S. 246, cited by the Appellant, was **not a criminal case,** but was a suit brought to restrain further interference with the closing or completion of a dam on a river in Oklahoma, and wholly fails to support the contention of the Apellant. It is without value in this case.

We frankly and freely concede that the Game and Fresh Water Fish Commission is a constitutionally created commission. We also concede, without argument, that its rules are enforced in the State of Florida so long as those rules are within the scope of the amendment creating it. For these purposes

they are given the force and effect of law. However, these rules are not the **law of Florida.** They are still **rules** of the Game and Fresh Water Fish Commission. Even the Commission itself does not call them **law.** It calls them **"rules."** They are printed in a little pamphlet known as the Wild Life Code. The laws of Florida are published by the Secretary of State as "Florida Statutes", and by Harrison & Company and West Publishing Company as the "Florida Statutes Annotated." These laws are revised every two years after the Legislature adjourns, and they remain the law, as interpreted by our courts, until the Legislature convenes two years hence. The **rules** of the Game and Fresh Water Fish Commission are found nowhere among these **laws.**

There is a very fundamental and impelling reason why these **rules** are not found among our **statutes.** They can, and often do, change with the moon, and are as variable as the tides. A **rule** of the Game and Fresh Water Fish Commission may be passed today and filed with the Secretary of State. The Legislature says it shall become effective thirty days thereafter. Whether it had the authority to say that or not, is questionable. But, at any rate, tomorrow at an early breakfast the Game and Fresh Water Fish Commission can change its **mind** and change its **rule,** and file a new pronouncement with the Secretary of State, which will become effective thirty days thereafter. It would not be likely to do this every day, but there is certainly no restriction upon how often it can do it, except its own discretion. The Legislature, recognizing the inability of the citizens, or even the lawyers, of the State to know what the rule is at

a particular moment, prescribes certain things that the Commission should do, like sending copies to the county judges, but all these provisions are merely directory and not mandatory (see par. (5), Sec. 372.021, F.S.A., p. 24 of Appendix to Appellant's brief), and do not reach the heart of the evil. This little pamphlet can be obtained from the Commission, and may be shown to be authentic as of a **particular date** written in pen and ink, so that if the rule or regulation is changed the next day, the next week, or the next month, they can write in a different date.

For the United States Government to predicate its criminal statutes upon such an arbitrary, vascillating, and varying **rule or regulation,** would have most serious and far-reaching consequences. The enforcement of law must necessarily depend upon the principle that ignorance of the law is not a defense, but this must be predicated upon the corollary that a citizen shall be given a reasonable opportunity to ascertain the law and to know it and to learn it, and that he must not close his eyes to the law and then use ignorance of it as an excuse. All this philosophy fails if the citizen has no reasonable opportunity to learn the law, and if the law may be changed more rapidly than it can be learned.

The Florida decision cited by the Appellant, to-wit: **Bronson v. State of Florida,** 83 So. 2d 849, dealt primarily with resisting arrest. However, after the defendant was arrested, he was found to have alligator hides under eight feet in length, in violation of a rule of the Game and Fresh Water Fish Commission. Before the court decision had been hand-

ed down, the rule had been changed to alligator hides under **six feet.** There probably are not ten lawyers in the State of Florida who at the present moment would know whether the rule is now four feet or ten feet, or no feet, unless he has had occasion within the last few days to secure from the Game Commission the little pamphlet certified in ink as being one as of a certain date. Even then, without telephoning the Secretary of State, he would not know but what the rule had been changed the next day. The several Florida decisions cited by Appellant are not determinative of the issue in this case. We have already readily admitted that the **rules** of the Commission are enforceable in the State, but it does not follow that a penal Federal Statute automatically attaches, when to do so would violate the **words** and the **principles** in such Statute.

The most essential thing in this United States is for its citizens to obey and bow to the majesty of the law, and respect it. This implies, as a necessary corollary, that the law can be known so that it can be obeyed, and so that it can be respected. One can not obey, nor can one respect, the unknown, and this great objective is a two-fold proposition. It places upon the lawmakers the duty of making and explaining its law so that it can be known and obeyed, as well as the duty upon the citizen to diligently strive to know and to obey it. To extend a Federal statute, criminal in its nature, based upon the **law** of Florida, so as to make that Federal statute conditioned upon the violation of an **arbitrary and changing rule** or regulation, is to violate the foregoing principles.

Furthermore, to extend the basis of the Federal statute beyond the State law, as codified in our statute books, is to start down a path, the end of which we can not see. If this can be applied to a **rule** of the Game and Fresh Water Fish Commission of five members, it would likewise apply if the number were reduced to three—to two—to one. If it applies when the only restriction upon its change is the **whim** and **feelings** of the Commission, it could be applied to the whim and feelings of a single individual. If it can be applied when the rule need not be codified and when the only requirement is that it be filed with the Secretary of State within thirty days, it would likewise be applicable if the thirty days were reduced to twenty—to ten—abolished altogether.

When Congress passed this Act in question in 1926, it certainly did not have in mind any rules of the State Game and Fresh Water Fish Commission, because such Commission did not become operative until January 1, 1943. Had Congress intended that this Act should apply to rules of a **commission**, or the orders or rules of some State executive officer, not codified, not known, nor of any regular or definite standing—then the Congressional Act could well have cured this ambiguity by saying also the "rules and regulations of any commission of any official, when such rules and regulations are enforced within the state." But the Congressional Act **did not say this!** To read this into it now, by **construction,** is to read into it what was not said and what was not there before. To make this statute the basis of this criminal prosecution, it is necessary to stretch it by interpretation beyond the language of the Act—we

believe beyond the intention of the Act—and create a **constructive offense.** We respectfully submit that this is not only outside the language of the Statute as passed by the Congress; but it is not in accordance with its intendments, and that it imperils and jeopardizes, without due process of law, the liberty of our citizens.

We respectfully submit that the "law of the State" of Florida, as used in the Federal Black Bass Act of 1926 as a basis for criminal prosecution, had reference to the **laws** of Florida that are to be found in the statutes of the State of Florida, and as interpreted by our courts. It was never intended to include, and does not include, **rules** and **regulations** as changeable as the winds, and that can not possibly be codified and included among our State laws for the reason that they do not have the necessary permanence.

Stoffel v. W. J. McCahan Sugar Refining & Molasses Co. 35 Fed. 2d 602 (Penn.)

* * * *

(Headnote)

"2. United States, Key 5—United States Law is to be Found in Constitution, Congressional Acts, Treaties, and Matters Specially Committed to Judicial Power in Court Rulings.

"Law of state is to be found in its statutory and constitutional enactments as interpreted by its courts, and, in absence of statute law, in rulings of its courts, whereas law of United States is to be found in Constitution and acts of Congress passed pursuant thereto, and in its treaties as interpreted by courts,

and in those matters specially committed to judicial power in rulings of its courts."

(In the case)

"....The law of a state, as, for illustration, that of Pennsylvania, is to be found in its statutory (inclusive of its constitutional) enactments as interpreted by its courts and in absence of statute law in the rulings of its courts. Its laws are in consequence its statute or written and its judge-made laws, or leges non scripta. The law of the United States is to be found in its Constitution and the acts of Congress passed in pursuance thereof, and in its treaties all as interpreted by its courts, and in those matters specially committed to the judicial power in the rulings of its courts. The United States has thus only a written law, except in these latter matters, in which it also has a judge-made law. The judge-made laws of the state may be changed by the state Legislature, so far as its Constitution permits, and so likewise the maritime law of the United States may, generally speaking, be changed by Congress....."

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52 C. J. S. p. 1025

"The law of a state is to be found in its statutory and constitutional enactments as interpreted by its courts and, in the absence of statute law, in the rulings of its courts. Its laws are, in consequence, its statutes or written law, and its judge-made laws or leges non scripta...."

Argument as to Appellee's question, which is as

follows:

> "Where the Motion to Quash filed against an Information is based, among other things, upon independent grounds that the Information is defective for failure to contain sufficient averments, as well as on the ground involving the construction of a Federal statute; and where there is grave question as to the sufficiency of the Information to state a cause of action for lack of necessary averments; and where the court might well have quashed the Information upon the ground of insufficient averments; and the court, being of the opinion that the Federal statute did not apply, based its order thereon, and thus refrained, as unnecessary, from discussing or considering the other defects in the Information;—does an appeal from such an order lie direct to the Supreme Court of the United States, or should it have been taken to the Circuit Court of Appeals?"

In this connection, we submit that the sufficiency of the averments of the Information to state an offense is challenged in this case by the Motion to Quash. We contend that the scope of the Order of the Court not only covers the grounds dealt with, but also any other grounds that might have been dealt with leading to the **same conclusion.** The Court might well have felt that the Information was bad because the Federal statute did not apply, and **also** because the averments were insufficient. Having decided that the Federal statute did not apply, it was unnecessary to incorporate the other; or the learned Judge having examined the one ground and finding therein sufficient reason for quashing the Informa-

tion, might have deemed it unnecessary to consider all the other grounds that might lead him to the same conclusion. The Information should be quashed if there is one single ground in the motion to quash that is good. There may be two or six; the Court, having found one, proceeded to quash it; but involved in that Order are all the grounds which might have led the Court to the same conclusion. We submit, therefore, that the Appellant has misconceived its remedy and should have taken its appeal to the United States Circuit Court of Appeals.

In the case of **U. S. v. Swift & Co.**, 318 U. S. 442, 87 L. Ed. 889, 63 S. Ct. 684, it was held that an appeal could not be taken directly to the Supreme Court where the District Court based its decision in part at least on the inadequacy of the indictment to charge the alleged offense. Furthermore, in **U. S. v. Pepper Bros.**, 142 F. 2d, 340, it was held that if the information was quashed on the ground that the information was defective for failure to set out sufficient averments, as well as on the ground involving construction of a Federal statute, the appeal was properly taken to the circuit court of appeals rather than directly to the United States Supreme Court, and that the circuit court of appeals could review the district court's construction of the statute, as well as its ruling as to the insufficiency of the information.

CONCLUSION

We respectfully submit that the district court's interpretation of the statute was not erroneous, but was in accordance with the language of the Act of Congress, and that Appellant's contention would do

nothing less than create **constructive offenses** under United States law; that by the language of the Act it does not apply to regulations of a commission or any executive officer, changeable at will, with no substance or permanence—not codified among the statutes of the State, and impossible of such codification.

We further submit that there is encompassed within the court's order not only the ground specifically discussed therein, for quashing the Information, but all other grounds raised in the motion which might have led to the same conclusion, the discussion of which was therefore unnecessary.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT

We here incorporate in our brief, and as a part thereof, our motion to dismiss the said appeal or, in the alternative, to affirm the judgment of the district court, as if the same were set out in a separate instrument, and we incorporate here by reference such portions of our foregoing brief as would be proper in connection with such motion, and we therefore do move this Honorable Court to dismiss the said appeal or, in the alternative, to affirm the judgment of the district court.

Respectfully submitted,
O. S. THACKER
CLARENCE L. THACKER
of Thacker and Thacker
Kissimmee, Florida
COUNSEL FOR APPELLEE

May, 1956

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

ORLANDO DIVISION

UNITED STATES OF AMERICA vs.

LUDENIA HOWARD,

trading as Stokes Fish Company,

Case No. 910 Orl. Cr.

CRIMINAL INFORMATION

The United States Attorney charges:

On or about the 16th day of May, 1955, at Sanford, Seminole County, Florida, in the Southern District of Florida, LUDENIA HOWARD, trading as Stokes Fish Company, delivered to the Railway Express Agency, Inc., for transportation from Sanford, in the State of Florida, to Macon, in the State of Georgia, 150 pounds of fresh water bream, fresh water crappie, and fresh water black bass, and such transportation was then and there contrary to the laws of the State of Florida; in violation of Section 852, Title 16, United States Code.

Vernon W. Evans, Jr.
Vernon W. Evans, Jr.
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA,

ORLANDO DIVISION

UNITED STAES OF AMERICA vs.

LUDENIA HOWARD,

trading as Stokes Fish Company,

Case No. 910 Orl. Cr.

MOTION TO QUASH INFORMATION

Comes now the Defendant, by her undersigned attorneys, and moves this Honorable Court to quash the criminal information filed against the Defendnt, Ludenia Howard, upon the following grounds, to-wit:

1. The said Information fails to state a cause of action against this Defendant.

2. The said Information fails to allege that the Defendant, Ludenia Howard, had any knowledge of the nature of the said shipment delivered for said transportation.

3. The said Information fails to allege that Ludenia Howard personally delivered the alleged fish to the Railway Express Agency, Inc., for transportation.

4. Said Information fails to allege that the said Defendant, Ludenia Howard, had any personal connection with the said transaction in any way, or that she had any knowledge of the said transaction.

THACKER AND THACKER

By O. S. Thacker
O. S. Thacker
ATTORNEYS FOR DEFENDANT
P. O. Box 527, Kissimmee, Florida

I hereby certify that copy
hereof has been furnished
Vernon W. Evans, Jr., Esq.,
Assistant United States
Attorney, P.O. Bldg., Tampa,
Florida, by mail, this 10th
day of November, A .D., 1955
O. S. Thacker
ATTORNEY